

FCC MAIL SECTION

Federal Communications Commission

DA 99-2115

OCT 15 9 18 AM '99

DISPATCHED BY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.202(b))	MM Docket No. 93-279
Table of Allotments,)	RM-8368
FM Broadcast Stations)	RM-8385
(Cal-Nev-Ari, Boulder City, and Las Vegas,)	
Nevada))	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: September 29, 1999

Released: October 8, 1999

By the Chief, Allocations Branch:

1. The Commission has before it an Application for Review¹ filed by Richard W. Myers ("Myers") that appeals the determination in the Report and Order² in this proceeding that Cal-Nev-Ari did not qualify as a community entitled to a broadcast allotment pursuant to Section 307(b) of the Communications Act of 1934, as amended, and therefore that FM Channel 285A should not be allotted to Cal-Nev-Ari, Nevada.³ Upon review of the record in this case and the relevant precedents that define what constitutes a "community" entitled to a broadcast allotment, we have determined that Cal-Nev-Ari is a community entitled to an FM allotment. Since we now believe that Channel 285A should have been allotted to Cal-Nev-Ari, Nevada, and since no opposing pleadings have been filed, we have construed the Application for Review as a Petition for Reconsideration of the referenced Report and Order and will grant Myers the relief requested.⁴ For the reasons stated below, we reverse the Report and Order's decision not to allot FM Channel 285A to Cal-Nev-Ari, Nevada, and we add that channel to the FM Table of Allotments as requested.

¹ Myers filed a "Supplement to Application for Review" on August 22, 1995, to call the Commission's attention to a very recent decision that allegedly appeared to be inconsistent with the decision in this proceeding.

² 10 FCC Rcd 7717 (Allocations Br. 1995).

³ Myers is the only private party still involved in this case. He did not file a Petition for Reconsideration, but rather filed an Application for Review of the Report and Order.

⁴ Since we are granting the relief sought without referring the matter to the Commission, the Application for Review will be dismissed as moot.

2. Background. At the request of Myers, the Notice of Proposed Rule Making⁵ ("Notice") proposed the allotment of Channel 285A to Cal-Nev-Ari, Nevada, as its first local aural transmission service. The Notice determined that the information Myers provided in his petition for rule making was insufficient to conclude that Cal-Nev-Ari is a community for allotment purposes. Therefore, the Notice requested that Myers provide specific information as to the social, economic, cultural, and governmental indicia of Cal-Nev-Ari to demonstrate that it is a community for allotment purposes.⁶

3. Although the Report and Order recognizes that the 1995 Edition of the Rand McNally Commercial Atlas lists Cal-Nev-Ari as having a population of 350 persons, it also observes that Cal-Nev-Ari is neither incorporated nor listed in the U.S. Census.⁷ The Report and Order describes Cal-Nev-Ari, Nevada, as consisting of two population groups located on opposite sides of Interstate 95. On one side of that road is a double row of mobile homes with an airstrip behind them. The other side of the road has a casino which also houses the post office, a gas station which is closed two days of the week, a laundromat, mobile homes, a motel, a market, recreational vehicle (RV) park and a ranch.⁸ The Report and Order observes that the casino is owned by Ms. Nancy Kidwell, who also owns and operates the coffee shop, mobile home park, RV park, service station, laundromat, market, airport, and the water and sewer service. In arguing that Cal-Nev-Ari is a "community" for allotment purposes, Myers stressed that Cal-Nev-Ari has its own post office and zip code and has local businesses that are identified with and serve Cal-Nev-Ari and not some other community or larger area. Myers also submitted a report by two sociologists who interviewed the residents of Cal-Nev-Ari. Myers claims that the report clearly demonstrates that the residents of Cal-Nev-Ari think of themselves as residents of a community.⁹

4. The Report and Order states that the information submitted by Myers indicated that "Cal-Nev-Ari is an isolated population pocket where residents feel a kinship with one another and

⁵ 8 FCC Rcd 7985 (Allocations Br. 1993).

⁶ After the issuance of the Notice, Rock "N" Roll, Inc. ("RNR") filed a petition for rulemaking requesting the modification of Boulder City, Nevada, Station KRRI's license to specify Channel 286C2, rather than its present Channel 288C2, and the modification of Las Vegas Station KRBO's license to specify channel 289C2 rather than its present channel 286C2. The purpose of RNR's petition was to increase the channel separation between Stations KRRI and KRBO for the purpose of alleviating alleged interference between the two stations. Since RNR's petition was mutually exclusive with that of Myers and since RNR's petition was filed within a time period that allowed it to be considered as a counterproposal to that of RNR's petition, the staff accepted RNR's petition as a counterproposal herein. The Report and Order denied RNR's petition for rulemaking.

⁷ 10 FCC Rcd at 7719.

⁸ 10 FCC Rcd at 7718.

⁹ Id.

provide assistance whenever possible and necessary." Nevertheless, the Report and Order concluded that although "there is indeed a general spirit of humanity and cooperation among the residents, it does not rise to the level of a community for allotment purposes."¹⁰ The Report and Order stresses that Cal-Nev-Ari has no local government and no community organizations such as a Chamber of Commerce, Rotary Club or Lions Club. The Report and Order found the lack of any civic or social organizations or religious institutions to be significant in determining that Cal-Nev-Ari lacked the indicia of a community for allotment purposes. It also noted that Myers claims that municipal "concerns," such as police service, are decided by the Clark County Commissioners without input from residents of Cal-Nev-Ari and that the only community meetings held in Cal-Nev-Ari concern the running of the volunteer fire department. The Report and Order observes that the residents of Cal-Nev-Ari built the fire house, but that both the fire truck and ambulance were provided by county grants.

5. Application for Review. Myers filed an Application for Review of the Report and Order in which he argues that a community as isolated as Cal-Nev-Ari should be allotted an FM channel.¹¹ Myers argues that Cal-Nev-Ari is more than 25 miles away from any other human enclave of comparable size, with no local transmission service in its community or nearby, and should therefore, as a matter of common sense, be entitled to a local transmission service. Myers contends that the Commission need not hold that the Bureau erred or applied precedent incorrectly. Rather, Myers argues, the Commission can simply rule that an FM channel can be allotted to Cal-Nev-Ari based on the facts of this particular case.¹²

¹⁰ 10 FCC Rcd at 7719.

¹¹ The Report and Order stated, in footnote 3, that the Commission would not consider a letter favoring Myers' proposal that was submitted in this matter by Harry Reid, a United States Senator from Nevada, that was received at the Commission on January 6, 1994. The basis for this action was that a copy of the letter was not served on RNR, the counterproponent in this proceeding, and therefore the letter was deemed to be a prohibited ex parte filing. It is not clear whether the foregoing letter constituted a prohibited ex parte filing, since it is not clear whether Senator Reid was, or should have been, aware of RNR's counterproposal at the time (December 28, 1993) Senator Reid submitted the letter to the Commission. Public Notice of the filing of RNR's counterproposal was given on January 11, 1994, Report No. 1996. In any event, it is clear that a copy of the letter was filed with RNR on February 1, 1994, when Myers served his "Supplemental Reply Comments" on RNR and the Commission. Given the foregoing facts and circumstances we shall include the letter in the record. In this regard, we also overrule the Report and Order's refusal to consider Myers' "Supplemental Reply Comments" and accept those "Supplemental Reply Comments" for filing because, as Myers has stated, if we did not consider those "Supplemental Reply Comments," Myers would be precluded from responding to the arguments against Myers' proposal that were made for the first time in RNR's Reply Comments.

¹² In his "Supplement to Application for Review," Myers notes that the Commission allotted a Class A FM channel to Roann, Indiana, which is listed in the U.S. Census, has a population of 447 persons, does not meet the minimum standard of 1,000 persons to be a Census Designated Place, and does not appear to be substantially different from Cal-Nev-Ari. In this light, Myers argues that the Commission was arbitrary in denying the Cal-Nev-Ari proposal. See 10 FCC Rcd 7746 (1995). We reject Myers' argument. The community of Roann, Indiana, unlike Cal-Nev-Ari, is listed in the U.S. Census, which gives rise to a presumption that Roann qualifies as a community for allotment purposes. There is no requirement that a town or village be a Census Designated Place

6. Discussion. After having considered the facts and arguments in this case, we have determined that Cal-Nev-Ari constitutes a community for allotment purposes and we shall allocate Channel 285A to that community as proposed in the Notice.¹³ In reviewing the facts of this case, we have been guided primarily by the Commission's prior decision in Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcasting Assignments (Semora, North Carolina) (Semora), 5 FCC Rcd 934 (1990). In Semora, the Commission found that Semora, North Carolina, was a community for allotment purposes even though Semora was not listed in the census reports, had an estimated population of only 150, had no local government, and provided no municipal services except for its volunteer fire department. That case noted that even though residents relied on the county to provide police and schools, there could be any number of reasons as to why such services are provided on a county-wide basis as opposed to a local basis. Both Semora and Cal-Nev-Ari have their own post offices and local volunteer fire departments and evidence commercial activity. Neither community is a small municipality on the fringe of a larger urban area. Although Semora has a civic organization (the Semora Ruritan Club) and two churches, both of which have Semora in their names,¹⁴ the record in the case now before us indicates that the residents of Cal-Nev-Ari are more deeply engaged in the operation of their volunteer fire department than most communities, including the actual construction of their own firehouse.¹⁵ All the money for lumber, concrete, and supplies needed in building and maintaining the fire station has come from community donations and proceeds from community events. The residents of Cal-Nev-Ari have quite a few social functions to raise money for materials and supplies utilized by its fire fighters and the volunteer medical rescue squad, including spaghetti dinners, rummage sales, and an annual fund-raising event called the Chili Cook-off.¹⁶

7. It is not unusual that an isolated community like Cal-Nev-Ari, which is located in a desert, should be more concerned with survival issues, such as having an adequate water supply and a functional fire department, than a community like Semora, which is located in more normal terrain. In this respect, the fact that Mrs. Kidwell owns the local water and sewer service does not detract from the fact that Cal-Nev-Ari does not rely on county government for such services. The report submitted by two sociologists who analyzed Cal-Nev-Ari, Nevada, and interviewed

in order to qualify as a community for allotment purposes.

¹³ The reference coordinates for Channel 285A at Cal-Nev-Ari are North Latitude 35-17-12 and West Longitude 114-51-57. The Government of Mexico has concurred in this allocation.

¹⁴ The casino in Cal-Nev-Ari is named "Cal-Nev-Ari Casino." See Exhibit C to "CAL-NEV-ARI, NEVADA, A Case Study of Community Development" by Ms. Victoria J. Evans and Donald E. Carns (December 13, 1993) ("Case Study"). Myers submitted this Case Study as an attachment to his comments. In addition, Cal-Nev-Ari has a water tower labelled "Cal-Nev-Ari, Nevada" in bold lettering. See Case Study at page 3.

¹⁵ See Case Study at page 11.

¹⁶ Id.

its citizens explains that small communities in the desert area containing Cal-Nev-Ari have to rely on their own resources to obtain water.¹⁷

8. Although Semora's community status was established in part by a petition signed by a number of individuals attesting to their belief that Semora is a community and by letters supporting this contention, Myers established Cal-Nev-Ari's community status by having two professional sociologists conduct a case study, interview local residents¹⁸ and submit a report on Cal-Nev-Ari. It would appear that Cal-Nev-Ari's status as a community is supported by evidence as convincing as that presented in Semora. In any event, residents of both communities provided "evidence of the subjective belief of area residents"¹⁹ that Semora and Cal-Nev-Ari are communities. Thus, both communities provided subjective evidence as well as "objective indications of the existence of a common perception that a locality's populace constitutes a distinct 'geographical population grouping'".²⁰ We note that each of the factors indicating the existence of a cognizable "community" discussed above, when considered in isolation, would not necessarily make an area a community. Rather, when viewed together, the factors are strong evidence of the existence of a community.²¹ Although Semora and this case present the bare essentials required to establish the existence of a community, we continue to believe that Semora was decided correctly and that this case falls within the parameters of Semora. In addition, our finding that Cal-Nev-Ari, Nevada constitutes a community for allotment purposes is in accordance with other leading Commission-level decisions on the subject. See Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations, (Kenansville, Florida),²² Beacon Broadcasting,²³ and Seven Locks Broadcasting Co.²⁴

9. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective November 22, 1999, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules IS AMENDED with respect

¹⁷ See Case Study at pages 5-6.

¹⁸ See Appendix A to the Case Study for the methodology of conducting the interviews and page 9 of the Case Study for an analysis of the interviews.

¹⁹ 5 FCC Rcd at 935.

²⁰ 5 FCC Rcd at 934, citing Beacon Broadcasting, 2 FCC Rcd 3469 (1987).

²¹ See Teche Broadcasting Corp., 52 FCC 2d 970, 973 (Rev. Bd. 1975) (test for community status encompasses consideration of the totality of the circumstances).

²² 10 FCC Rcd 9831 (1995).

²³ 2 FCC Rcd 3469 (1987).

²⁴ 37 FCC 82 (1964).

to the community listed below, as follows:

<u>City</u>	<u>Channel No.</u>
Cal-Nev-Ari, Nevada	285A

10. A filing window for Channel 285A at Cal-Nev-Ari, Nevada, will not be opened at this time. Instead, the issue of opening a filing window for this channel will be addressed by the Commission in a subsequent order.

11. IT IS FURTHER ORDERED, That the Application for Review filed by Richard W. Myers IS DISMISSED as moot.

12. IT IS FURTHER ORDERED, That this proceeding is TERMINATED.

13. For further information concerning the above, contact R. Barthen Gorman, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau